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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ESSEX INSURANCE COMPANY, Plaintiff and Appellant, v. PROFESSIONAL BUILDING CONTRACTORS, INC., Defendant and Appellant.	B206879 (Los Angeles County Super. Ct. No. BC353152)

APPEAL from an order of the Superior Court of Los Angeles County. James C. Chalfant, Judge. Affirmed and remanded.

Stanzler Funderburk & Castellon and Jordan S. Stanzler for Defendant and Appellant.

LeClairRyan, David V. Rose, Vickie V. Grasu and Matthew R. Halloran for Plaintiff and Appellant.

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Defendant and appellant Professional Building Contractors, Inc. (PBC) appeals from an order granting a new trial on the issue of punitive damages imposed against plaintiff and appellant Essex Insurance Company (Essex). Following a jury trial on PBC's claims for breach of contract and bad faith denial of insurance coverage against Essex, the jury awarded $682,264.22 in compensatory damages and $2.5 million in punitive damages. The trial court thereafter conditionally granted Essex's motion for new trial on the issue of punitive damages, ordering that it would be denied if PBC consented to a remittitur of punitive damages in an amount equal to the compensatory damages award. It also denied Essex's motion for judgment notwithstanding the verdict, limited to punitive damages. PBC did not consent to the remittitur, and both PBC and Essex have appealed.

We affirm. The trial court properly exercised its discretion to reduce the punitive damages award to a one to one ratio on the basis of the evidence concerning Essex's reprehensibility and the amount of compensatory damages awarded. That same evidence supported the trial court's decision to deny Essex's motion for judgment notwithstanding the verdict.

FACTUAL AND PROCEDURAL BACKGROUND

The SPARTA Program.

Essex, based in Virginia, is a surplus lines company, meaning it is not an admitted insurance company and may sell insurance in California only through a licensed surplus lines broker who has binding authority for Essex in California. Essex used Yates & Associates as its broker. That broker may offer insurance only through a retail agent, who acts on behalf of the insured. Surplus lines companies fill a niche in that they write policies that insurers admitted in California might not; correspondingly, they are not protected by California's financial guarantee to pay claims on behalf of bankrupt insurance companies. California is one of the top three surplus lines states in the country. In order to obtain a surplus lines policy, a prospective insured must have been turned down by a specified number of standard market insurers.

The policy Essex ultimately issued to PBC was part of the City of Los Angeles's (City) Service Providers & Artisan Tradesman Activities Program (SPARTA Program), established several years earlier to help small municipal contractors having difficulty meeting the City's insurance requirements. Under the SPARTA Program, Essex issues a master policy (Policy) to the City and municipal contractors may then apply on a project basis to become additional insureds under that Policy.

In addition to requiring Essex to defend and indemnify the insured in any suit seeking damages for specifically defined property damage and bodily injury, the Policy gave Essex discretion to investigate and settle any claim or suit. The Policy further required the insured to provide notice to Essex, as soon as practicable, of any occurrence, claim or suit. In order to prevent collusion between a claimant and the insured, and to allow Essex to investigate a claim, the Policy provided that "[n]o insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent." Further, the Policy did not provide coverage for loss or damage arising from the actions of independent contractors or subcontractors acting on behalf of the insured.

Under the SPARTA Program, a contractor seeking coverage under the Policy would contact a retail agent and telephonically apply for coverage. The retail agent, in turn, would submit a certificate through Essex's broker who would endorse the certificates onto the Policy once every month. Municipality Insurance Services, Inc. (Municipality) acted as the retail agent for the SPARTA Program. Municipality received 20 percent of the premium as its commission.

The SPARTA Program instruction booklet stated that claims were to be reported to Municipality. Essex took no steps to determine whether the SPARTA Program instruction booklet accurately reflected the insurance program.

It was not Essex's policy to provide a copy of the Policy to all named insureds; in fact it never delivered a copy of the Policy to its insureds. Only the City retained a copy of the Policy.

PBC Obtains Insurance Through the SPARTA Program.

Rick Williams (Williams) and his wife are the owners of PBC, a company employing approximately 10 to 12 individuals on a full-time basis. PBC first performed sound abatement work for the City in 1999. In order to obtain jobs, Williams would look through the City's "spec book" which advertised requests for bids. A contractor who successfully bids on a job must have insurance in order to secure the contract for the work. Williams saw advertisements for the SPARTA Program in multiple spec books, including the one advertising the bid for work on the house owned by Gary and Susan Robinson (Robinson house). The advertisement indicated that insurance through the SPARTA Program met the City's minimum requirements and covered applicable bodily injury and property damage caused by contractors' activities while under contract with the City. According to the advertisement, the insurance provided by the SPARTA Program was underwritten by Essex and administered by Municipality.

In early March 2003, Williams telephoned the toll-free number listed in the advertisement; he reached Carol Frost (Frost) at Municipality. Williams indicated that PBC was bidding on sound abatement work for the City as part of the Los Angeles International Airport (LAX) sound abatement program, and Frost responded, "I know exactly what you do. I wrote the insurance program for the City, and, yes, we can cover you." Frost had been aware of the City's sound abatement program since 1997. Frost did not inquire about any specific work that PBC would be performing, including whether it would be doing roofing. After Williams provided her with information about what bids he anticipated PBC winning, Frost sent a quote which Williams accepted.

PBC was added as a named insured certificate holder to the Policy for a one-year period beginning March 17, 2004. PBC received aggregate coverage of $5 million for a $36,000 premium. According to PBC's certificate of insurance, its hazard rating was based on coverage for "[d]oors & windows installation, sound proofing [and] building noise abatement near Los Angeles World Airport." Essex considered roofing to be a high risk hazard that required a higher premium than other risks enumerated in the scheduled hazards. Coverage for roofing was available under a separate endorsement. Williams,

however, believed that he would be covered for all work performed in connection with the sound abatement program. Williams received a certificate of insurance signed by Frost as president of Municipality; though the certificate provided that Essex was PBC's insurer, it did not provide any contact information for Essex. He did not receive a copy of the Policy. By telephone, Williams renewed PBC's insurance with Municipality in March 2004.

Coverage Issues Arise Following PBC's Work on the Robinson House.

In August 2004, PBC received the contract for sound abatement work on the Robinson house. Part of the specifications for that contract required the installation of a secondary roof. The specifications involved demolition of the existing roof and installation of new wooden framing, insulation and a new steel roof. PBC had demolished the existing roof and installed steel joists by October 2004; at that time a severe storm hit, blowing off the protective tarp that had been placed where the roof had been. The Robinson house suffered severe water damage to the ceiling, walls and floor.

The first business day after the damage, Williams telephoned Municipality and spoke with Lilly Kotlar (Kotlar), Frost's assistant, informing her of the damage to the Robinson house. He made this call in accordance with the SPARTA Program brochure, which expressly stated: "Claims to be reported to Municipality Insurance Services, Inc." Throughout his 29-year career, Williams had only made a claim to his own insurance agent—not directly to the insurer. Kotlar indicated that she did not believe PBC would be covered for the damage, noting that coverage was restricted to door and window installation. Williams asked for confirmation, and Kotlar, after checking with Frost, called Williams and stated that PBC was not covered. Kotlar told him that PBC could submit a claim, but Williams believed that would be futile in view of the absence of coverage. Kotlar never explained to Williams that PBC was required to make a claim with Essex directly. According to Frost, Kotlar had been trained to obtain a written report of the claim and report such a claim to Yates & Associates, who would in turn report it to Essex. This is because when Municipality receives a claim, it acts as an agent of Yates & Associates.

To mitigate the damage and attempt to avoid a lawsuit, PBC worked for several months and spent over $100,000 to repair the damage to the Robinson house, during which time the Robinsons complained about the damage to their house and to the health of their children. PBC initially performed emergency repairs and then began renovation work. PBC also reimbursed the Robinsons for the loss of certain items of personal property. In May 2005, when PBC had almost completed the repair work, the Robinsons (both attorneys) asked Williams for a good faith offer of settlement. At that point, Williams contacted an attorney, who in turn contacted Essex.

PBC tendered to Essex its claim relating to damage to the Robinson house on May 27, 2005.[1] At that point, the Robinsons had not yet filed a complaint. PBC also forwarded a May 5, 2005 letter from the Robinsons, which outlined the items of damage they attributed to PBC's conduct. On May 31, 2005, PBC's claim was assigned to Essex claims adjuster Joseph Feichtel (Feichtel). He spoke with Essex underwriter David Weisenberger (Weisenberger), who opined that Essex would be "hard pressed to deny coverage"; Weisenberger also provided Feichtel with a SPARTA Program brochure, but Feichtel did not put it in PBC's claim file. Feichtel had not previously handled a claim through the SPARTA Program. One week later, Feichtel responded to PBC, accepting the tender with a full reservation of rights. Though he was aware of it, Feichtel did not investigate that PBC had earlier provided notice of the claim to Kotlar at Municipality.

During June 2005, PBC's attorneys and Essex exchanged correspondence which confirmed that subcontractors had been used at the Robinson house. Feichtel also received a June 22, 2005 report from Koning & Associates (Koning), an independent adjuster retained by Essex. Koning indicated that it was unable to estimate the cost of repairs because all repair work had been performed. On June 23, 2005, PBC wrote to Essex, asking it to consider settlement opportunities given its assessment that the claim

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[1] Simultaneously, Williams contacted Municipality to renew his insurance, this time specifically securing a roofing endorsement.

would be ripe for settlement before any lawsuit was filed. Essex responded the next day, stating that it was not in a position to offer any monies toward settlement.

On June 27, 2005, the Robinsons submitted a claim to the City pursuant to the Tort Claims Act (Gov. Code, § 810 et seq.). Thereafter, PBC requested that Essex clarify its coverage position, given the denial of coverage provided by Municipality and the reservation of rights provided by Essex. On August 8, 2005, Essex's attorneys wrote to PBC, reaffirming that it had accepted the tender with a full reservation of rights, and adding that it did not intend to reimburse PBC for any voluntary payments made prior to tender, that at that time it did not intend to contribute any amount toward settlement, and that it had no obligation to defend PBC because no lawsuit had yet been filed. PBC responded, contesting Essex's defense and coverage determinations. Essex briefly restated its positions in an August 26, 2005 response, expressly stating that it expected PBC to comply with the Policy's notice provision, cooperation clause and no-voluntary-payments provision.

On September 2, 2005, PBC tendered to Essex the Robinsons' tort claim for defense and indemnity. In additional correspondence throughout October and November 2005, the parties continued to maintain their positions.

The Robinsons filed a complaint (Robinson action) against the City and PBC in February 2006, alleging causes of action for breach of contract, breach of third party beneficiary contract, negligence, negligent misrepresentation and nuisance; the City and PBC were served in March 2006. On April 13, 2006, PBC tendered the Robinson action to Essex. Essex responded on May 12, 2006, agreeing to defend PBC in the Robinson action subject to a reservation of rights. PBC asked and Essex agreed to retain attorney Mark Koorenny (Koorenny) to defend it. Throughout 2006, Koorenny provided periodic status reports to Essex. Koorenny did not provide Essex with a liability and damages analysis of the case, despite Feichtel having asked for one.

The Pleadings, Trial and Posttrial Motions.

At the end of May 2006, Essex filed a declaratory relief action against PBC. It sought a declaration that it owed no duty to PBC or the City to defend or indemnify them in the Robinson action. It alleged that it owed no duty to PBC because the Robinsons' claims were not within the scope of or were excluded from coverage, as the policy did not cover roofing installation or the use of subcontractors; PBC failed to provide proper notice to Essex; and PBC made voluntary payments preceding the Robinson action. PBC and the City answered, generally denying the allegations and asserting several affirmative defenses.

The parties attended a mediation on February 1, 2007. Initially, the Robinsons demanded $700,000 and Essex, on PBC's behalf, offered $25,000. When that amount was not accepted, Essex's representative left shortly after noon. Thereafter, the mediation continued and the parties reached a settlement amount of $250,000. By letter dated February 5, 2007, Koorenny advised Essex that it viewed the settlement as reasonable and asked Essex to participate given that the amount was within Policy limits and would avoid potential exposure above those limits. Feichtel responded that Essex declined to fund the settlement amount due to the absence of evidence regarding the personal injuries the Robinsons claimed to have suffered, the possibility that certain claimed items of damage—such as loss of use—were not covered by the Policy, and the coverage issues raised earlier. According to Feichtel, because Essex perceived that PBC had breached the Policy, there was no coverage available to fund the settlement. Nonetheless, he later conceded at trial that the complete denial of coverage was a minor mistake, because the Robinsons' personal injury and loss of use allegations raised the possibility of coverage.

In March 2007, PBC and the City filed a cross-complaint against Essex, Municipality and Kotlar, alleging causes of action for breach of contract, tortuous breach of the implied covenant of good faith and fair dealing, negligent misrepresentation and negligence. They alleged that Essex had acted in bad faith by wrongfully denying coverage for the Robinson action. PBC filed a first amended cross-complaint (Cross-

Complaint) in June 2007, adding causes of action for violation of Business and Professions Code section 17200 and breach of fiduciary duty. It also added multiple factual allegations relating to the SPARTA Program and Essex's failure to investigate the facts relating to the claims raised in the Robinson action.

PBC settled with Municipality and Kotlar, and went to trial only against Essex. Moreover, the City dismissed its claims and was not a party at trial. A jury trial on PBC's Cross-Complaint commenced on October 1, 2007. Essex's expert Jerry Ramsey (Ramsey) opined that Essex properly investigated the Robinsons' claim, Essex owed no duty to settle under the circumstances presented and PBC breached the Policy's prohibition against voluntary payments by making repairs to the Robinson house without Essex's consent.

On the other hand, PBC's underwriting expert Andrew Barile (Barile) testified that it was not standard industry practice to take insurance applications via telephone; it was the insurance broker's obligation to explain policy coverage, terms and rates to the prospective insured; and, though it was appropriate for Municipality to receive notice of the claim, it was not standard industry practice for Municipality to opine on coverage. He also opined that roofing should have been covered under the Policy given that it was not specifically excluded from coverage, and that a reasonable insured would expect roofing to be covered. He testified that he had never seen an insurance program where the insured did not receive a copy of the policy. Further, he opined that Municipality, as a program administrator, acted as an agent of Essex.

PBC's claims handling expert David Peterson (Peterson) testified that Essex's overall investigation was unreasonable and below industry standards. Specifically, he opined that Essex conducted no investigation regarding the Robinsons' claimed damages; he further opined that Essex focused its coverage investigation on denying coverage—failing to explore the question of whether the SPARTA Program requirements rendered notice to Municipality adequate, whether coverage for sound abatement encompassed roofing and whether some of the Robinson's claimed personal injury allegations raised the potential for coverage. He also found fault with Essex's failure to consider PBC's

repair work as covered mitigation damages. He opined that Essex's failure to participate in the settlement was an improper denial of coverage and that Essex failed properly to evaluate the settlement value of the Robinson action. In declining to consent to the settlement, Essex also misrepresented the scope of coverage by finding no potential for a covered loss. Essentially, he opined that Essex abandoned PBC. Peterson likewise found that Essex's management's actions in connection with the claim fell below the industry standard of care.

By special verdict, the jury found that Essex materially breached the Policy and that the amount of the covered loss that Essex failed to pay was $356,264.22. It further found that Essex breached its duty to investigate, communicate and settle, and that the amount of covered loss that Essex failed to pay was $682,264.07. This amount equaled the amounts sought by PBC for settlement ($250,000), repair costs to the Robinson house ($106,264.22) and attorney fees ($325,999.85). Finally, the jury found by clear and convincing evidence that Essex acted with malice, oppression or fraud.

Having granted Essex's motion to bifurcate the issue of punitive damages, the trial court commenced a second trial phase in which it permitted PBC to read to the jury an excerpt of the deposition of Bradley Dickler, president of Essex, who stated that Essex's A12 rating meant the company maintained a policyholder surplus amount in excess of one-half billion dollars. Barile testified that the value of Essex's policyholder surplus was the same as the company's net worth. After the jury received an instruction on the purpose of punitive damages and heard closing arguments, it awarded PBC $2.5 million in punitive damages.

Thereafter, the parties submitted Essex's declaratory relief complaint to the trial court for adjudication. The trial court ruled that the damage to the Robinson house constituted a covered occurrence within the terms of the Policy. On the basis of the evidence adduced at trial, the trial court determined that Essex had abandoned any argument that the Policy did not afford coverage because of a classification limitation endorsement or because coverage for sound abatement did not encompass roofing. Treating Essex's additional coverage arguments as a motion for judgment

notwithstanding the verdict, the trial court further ruled that Essex owed a duty to defend; that it lost its right to control the settlement of the Robinson action when it unreasonably failed to investigate and communicate and wrongfully denied coverage; and that the jury's verdict necessarily determined that PBC was excused from compliance with the no voluntary payments provision of the policy due to Essex's failure reasonably to investigate, communicate about and settle the Robinson action.

Essex moved for a new trial on the issue of punitive damages. It argued that the jury's award was excessive and unsupported by the criteria by which courts evaluate the propriety of punitive damages awards. On the basis of the same arguments, it also moved for a partial judgment notwithstanding the verdict on the issue of punitive damages. PBC opposed the motions, asserting that punitive damages were warranted both because of Essex's conduct in connection with the SPARTA Program and its denial of coverage of the Robinson action.

Initially, the trial court denied the motion for judgment notwithstanding the verdict, finding sufficient evidence from which the jury could conclude that punitive damages were appropriate. But, citing *Jet Source Charter, Inc. v. Doherty* (2007) 148 Cal.App.4th 1 (*Jet Source Charter*), the trial court conditionally granted Essex's motion for new trial, finding that a ratio of one to one between compensatory and punitive damages was appropriate and ruling that the motion would be denied if PBC consented to such a remittitur. Observing that PBC was fully compensated for its losses, any loss was purely economic in nature, PBC was not financially vulnerable and Essex's conduct did not involve repeated actions with respect to PBC, the trial court reasoned: "While there was sufficient evidence of malice or oppression to support a punitive damages award, there was not egregious malice. Essex defended PBC in the underlying action, and it filed a declaratory relief action to ascertain the rights of the parties. These facts go a long way to mitigate any malice. This was not a case involving a fraud or deception of the public. Contrary to PBC's belief[,] it simply involved an unreasonable insurance coverage decision. PBC suffered no emotional harm."

PBC declined to consent to the remittitur and, instead, timely appealed from the order granting a new trial. Essex appealed from the denial of its motion for judgment notwithstanding the verdict.

DISCUSSION

PBC challenges only the trial court's granting a new trial on the issue of punitive damages. It asserts that all guideposts generally considered in assessing punitive damages awards supported the jury's $2.5 million award. Essex, on the other hand, contends there was insufficient evidence to support any punitive damages award. We see no basis to disturb the trial court's careful exercise of discretion in considering the evidence and conditionally granting a new trial.

I. The Trial Court Properly Exercised Its Discretion in Granting a Conditional New Trial on the Issue of Punitive Damages.

A. Applicable Law and Standard of Review.

Code of Civil Procedure section 657, subdivision (7), provides that "[a] new trial shall not be granted upon the ground of . . . excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision." Under Code of Civil Procedure section 662.5, subdivision (b), "[i]f the ground for granting a new trial is excessive damages, [the trial court may] make its order granting the new trial subject to the condition that the motion for a new trial is denied if the party in whose favor the verdict has been rendered consents to a reduction of so much thereof as the court in its independent judgment determines from the evidence to be fair and reasonable."

The conditional grant of the new trial is appealable. (*Miller v. National American Life Ins. Co.* (1976) 54 Cal.App.3d 331, 341–344.) A new trial motion is addressed to the sound discretion of the trial court, which is vested with authority to reweigh the evidence and disbelieve witnesses. (*Id.* at p. 345.) "[W]hen a trial court grants a new trial on the

issue of excessive damages, whether or not such order is conditioned by a demand for reduction, the presumption of correctness normally accorded on appeal to the jury's verdict is replaced by a presumption in favor of the order." (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 932 (*Neal*).) Thus, the order will not be reversed unless it plainly appears that the trial court abused its discretion. (*Id.* at p. 933; *George F. Hillenbrand, Inc. v. Insurance Co. of North America* (2002) 104 Cal.App.4th 784, 820 ["We review the trial court's reduction of the amount of damages as a condition to denying a motion for a new trial for abuse of discretion"]; *Miller v. National American Life Ins. Co., supra*, at p. 345 ["On appeal, all presumptions are in favor of the order as against the verdict, and the appellate court will reverse only if a manifest and unmistakable abuse of discretion is shown"].) "'So long as a reasonable or even fairly debatable justification under the law is shown for the order granting the new trial, the order will not be set aside. [Citations.]' [Citation.]" (*Gerard v. Ross* (1988) 204 Cal.App.3d 968, 978–979.)

Citing *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1172, PBC suggests we should exercise de novo review of the order granting a new trial. But that decision "address[ed] only the federal constitutional question, not any issue of excessiveness under California law." (*Id.* at p. 1167.) *Neal* is the controlling authority for excessiveness under California law; the court made clear that an order granting a conditional new trial "'will not be reversed unless it plainly appears that [the trial court] abused [its] discretion; and the cases teach that when there is a material conflict of evidence regarding the extent of damage the imputation of such abuse is repelled, the same as if the ground of the order were insufficiency of the evidence to justify the verdict.' [Citations.] The reason for this is that the trial court, in ruling on the motion, sits not in an appellate capacity but as an independent trier of fact." (*Neal, supra*, 21 Cal.3d at p. 933.) Thus, we determine only whether, in the exercise of its independent judgment, the trial court abused its discretion by reducing the punitive damages award to the same amount as the compensatory damages award.

B. The Trial Court's Consideration of Factors.

The trial court did not abuse its discretion. In its specification of reasons for granting the new trial, the trial court evaluated the punitive damages award by "'making an independent assessment of the reprehensibility of the defendant's conduct, the relationship between the award and the harm done to the plaintiff, and the relationship between the award and civil penalties authorized for comparable conduct.'" (*Jet Source Charter, supra,* 148 Cal.App.4th at p. 8.)

1. Reprehensibility.

Turning to the first criterion, the trial court expressly relied on the *Jet Source Charter* court's summary of the factors to be considered in evaluating reprehensibility: "'"'[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." [Citation.] We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. [Citation.] The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.'" (*Jet Source Charter, supra,* 148 Cal.App.4th at pp. 8–9, quoting *State Farm Mut. Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 419.) A further overarching consideration is that courts presume "'a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. [Citation.]' [Citation.]" (*Jet Source Charter, supra,* at p. 9.)

Applying these factors, the trial court determined that the evidence established Essex's conduct was not so reprehensible as to support a $2.5 million punitive damages award. Specifically, the evidence showed that any "losses were purely economic in

nature, there was no indifference to the health or safety of others, PBC was not financially vulnerable, and the conduct did not involve repeated actions with respect to PBC, which is the only pertinent party be considered." The trial court characterized Essex's conduct as not rising to the level of egregious malice involving fraud or deception of the public, but rather, involving only an unreasonable insurance coverage decision." The trial court's analysis is similar to that in *Walker v. Farmers Ins. Exchange* (2007) 153 Cal.App.4th 965, where the appellate court affirmed a remitted punitive damages judgment against an insurer, which was reduced from $8.3 million to $1.5 million. There, an evaluation of the reprehensibility factors showed a relatively low level of reprehensibility on the part of the insurer, given that the insurer's denial of a defense involved only economic harm and emotional distress, the denial was an isolated incident and it resulted from a mistake rather than intentional malice or deceit. (*Id*. at p. 973.) Here, likewise, the evidence showed that PBC suffered only economic harm; though Essex's failure to investigate, communicate and settle was in part the result of the SPARTA Program's requirements, there was no evidence that this was anything beyond an isolated incident; and Feichtel denied that Essex's complete denial of coverage was the result of intentional malice.

We are not persuaded by PBC's efforts to magnify what the trial court properly deemed "an unreasonable insurance coverage decision." Pointing to four specific factors, PBC contends the evidence established that Essex acted with extreme reprehensibility. First, PBC contends that Essex's failure to investigate the Robinsons' personal injury allegations—particularly those relating to their son—demonstrated an indifference to or reckless disregard of the health and safety of others. The evidence on this issue, however, was that Essex failed to investigate the personal injury allegations that the Robinsons made in letters to PBC. Feichtel admitted that while he reviewed the letters the Robinsons wrote to PBC, he did not investigate the claimed injuries to the Robinson child. There was no evidence presented that the Robinson child actually suffered the claimed injuries. Indeed, the purpose of the evidence of claimed injuries was to establish that Essex failed to conduct an adequate investigation. Feichtel's questioning focused on

how his failure to investigate those claims resulted in his inability to assess accurately how a jury might view the Robinsons' case. Under these circumstances, the trial court properly exercised its discretion to conclude indifference to the health or safety of others was not a factor supporting the jury's punitive damages award.

Second, PBC contends that the evidence established it was financially vulnerable, notwithstanding the trial court's conclusion to the contrary. Williams testified that in 2004 PBC's net profit was approximately $60,000 on sales of approximately $12 million. Though PBC argues that the inference to be drawn from that testimony is that payment of $106,000 in repairs to the Robinson house, plus $250,000 settlement and thousands in attorney fees rendered it financially vulnerable, there was no evidence that PBC's "net profit" figure had not already accounted for those expenses. Nor was there any evidence that PBC had difficulty meeting any expenses before trial. As explained in *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412, "the trial court's factual determinations, reflected in its decision to grant the new trial, are entitled to the same deference that an appellate court would ordinarily accord a jury's factual determinations." Given there was no evidence as to how PBC calculated the $60,000 net profit figure and no evidence that PBC suffered financial distress, we must defer to the trial court's finding that PBC was not financially vulnerable.

Third, PBC contends that Essex's conduct involved repeated actions and not merely an isolated incident. The focus of PBC's contention is on evidence concerning Essex's status as a non-admitted surplus lines insurer. Specifically, PBC contends that Essex repeatedly violated the Insurance Code through its practice of not delivering a copy of the Policy to additional insureds and hence not providing any notice to those insureds that they were dealing with a non-admitted carrier. (See Ins. Code, §§ 1764.1, subds. (a) & (b) [surplus lines brokers and nonadmitted insurers are required to provide specific notice to insureds relating to the insurer's nonadmitted status]; 1764.2, subd. (c) [surplus lines broker may not issue evidence of insurance from a nonadmitted insurer unless "[a] policy of insurance covering the insured for the risk has actually been issued by the nonadmitted insurer and delivered to the insured or his or her representative"].) But the

trial court repeatedly rejected PBC's efforts to premise liability on any statutory violation related to Essex's status as a surplus lines carrier. As the trial court recognized, the remedy for statutory noncompliance is cancellation of the policy—not punitive damages. (See Ins. Code, § 1764.1, subd. (a)(2).)

Finally, PBC contends the evidence showed Essex's conduct was the result of intentional malice. It finely parses each step in Essex's coverage determination to attempt to construct a scenario under which Essex intentionally thwarted PBC's effort to secure coverage for and settlement of the Robinson action. The trial court, however, viewed the evidence as a whole, and determined that Essex's unreasonable coverage decision, when coupled with its assumption of a defense and its efforts to secure a declaration of its rights, did not establish intentional malice, trickery or deceit. By the same token, however, the evidence established that Essex's denial of coverage was more than merely accidental. The evidence showed a pattern of studied inaction on the part of Essex. Specifically, Essex did not investigate any particulars of the SPARTA Program; Essex did not investigate the notice of the claim provided to Municipality, even though Essex was aware of it; Essex did not investigate whether it would be reasonable for PBC to assume that coverage for sound abatement work would encompass roof removal; and Essex did not investigate the conflict in the information concerning whether PBC had used subcontractors in it roof demolition at the Robinson house. As part of its inadequate investigation, Essex additionally failed to communicate with PBC, particularly concerning his assertion that coverage was denied at the outset by Municipality.

In addition to this inaction, the evidence further showed that Essex was consistently focused on denying coverage. (See *Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 965 [punitive damages warranted where insurer engaged in a course of conduct over a five-year period designed to avoid paying insurance benefits falling with policy's coverage].) Feichtel ignored Essex's underwriter's preliminary opinion that Essex would be "hard-pressed" to deny the claim. Consistent with Essex's improper focus, the evidence showed when faced with the possibility of settlement, Essex elected to respond by raising defenses to coverage that effectively constituted a denial of

coverage. At trial, in response to the question of whether Essex declined to fund the settlement because it believed there was no coverage for the Robinson action, Feichtel responded: "I would say that because there was a perceived breach of the contract, the insurance policy contract, that yes, there would not be coverage available for the $250,000 settlement." Feichtel later admitted that Essex mistakenly ignored the possibility of coverage for the Robinsons' claimed loss of use and personal injury. Though properly exercising its discretion to conclude that Essex's conduct was sufficiently reprehensible to support an award of punitive damages, the trial court likewise properly concluded that such conduct reflected a relatively low level of reprehensibility. (See *Walker v. Farmers Ins. Exchange, supra,* 153 Cal.App.4th at p. 73.)

2. Ratio to compensatory damages.

The trial court further reasoned that the evidence did not support the jury's approximate three and one-half to one ratio between punitive and compensatory damages. Again, the trial court relied on *Jet Source Charter, supra,*148 Cal.App.4th at pages 9 to 10, in which the court explained: "'[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. . . . [¶] . . . . When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.'" (Italics omitted.) Applying those principles, the court in *Jet Source Charter* held that where substantial compensatory damages had been awarded and the conduct in question involved economic harm to a single plaintiff who was not particularly vulnerable, a punitive damages awarding exceeding compensatory damages was inconsistent with due process. (*Id.* at p. 4.)

The trial court properly exercised its discretion to reach the same conclusion here. PBC received a substantial damages award in that the jury awarded the precise amount of damages that it sought. PBC cites no authority—nor have we located any—for its contention that prejudgment interest should be included in the ratio calculation. To the contrary, the court in *Bardis v. Oates* (2004) 119 Cal.App.4th 1, 18–19, stated that the

actual damages as determined by the jury should be used as the base figure for calculating the punitive damages ratio. PBC also attempts to alter the ratio by referring to the "potential injury" that was avoided by its actions in repairing the Robinson house and settling to avoid trial. (See *Simon v. San Paolo U.S. Holding Co., Inc., supra,* 35 Cal.4th at p. 1177.) But an assessment of previously avoided losses may not be considered in assessing the ratio of punitive damages to harm. (*Ibid.*) Only prospective injuries that are foreseeable from the defendant's conduct may be considered. "The potential harm that is properly included in the due process analysis is "'harm *that is likely to occur from the defendant's conduct*."' [Citation.]" (*Ibid.*)

PBC also endeavors to support the jury's ratio by referring back to the argument that Essex's conduct was extremely reprehensible and citing cases affirming higher ratios. The conduct supporting the punitive damages awards in those cases, however, was more reprehensible than the conduct in which Essex engaged. (See, e.g., *Bardis v. Oates, supra,* 119 Cal.App.4th at pp. 21–22 [punitive damages reduced to a nine to one ratio where the defendant's fraudulent conduct involved a systematic pattern of bilking his partners out of partnership funds and the evidence overwhelmingly showed the scheme was the result of intentional malice]; *Textron Financial Corp. v. National Union Fire Ins. Co.* (2004) 118 Cal.App.4th 1061, 1082 [punitive damages reduced to a four to one ratio where evidence showed that insurer employed trickery and deceit in its denial of a defense and coverage, including by backdating documents and removing documents from the claims file].)

Here, we see no basis to disturb the trial court's application of a one to one ratio. The Supreme Court in *Exxon Shipping Co. v. Baker* (2008) __ U.S. __ [128 S.Ct. 2605, 171 L.Ed.2d 570] reviewed studies evaluating the median ratio of punitive to compensatory verdicts, which "put the median ratio for the entire gamut of circumstances at less than 1:1 [citation], meaning that the compensatory award exceeds the punitive award in most cases." (*Id.* at p. 2633.) The Court noted that it "has long held that '[p]unitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor . . . and to deter him and others from similar extreme

conduct.' [Citations.]" (*Ibid.*) The trial court here properly exercised its discretion to conclude that employing the median ratio was sufficient to punish Essex and deter it and other insurers from similar conduct.

3. Civil penalties.

Though not expressly referenced in the order granting a new trial, we briefly address the third guidepost courts consider when evaluating punitive damages award, which is the disparity between the punitive damages award and the civil penalties authorized or imposed in comparable cases. (*Jet Source Charter, supra,* 148 Cal.App.4th at p. 8.) PBC contends that the trial court should have utilized the penalty provided by Insurance Code section 1764.7, which provides that a willful violation of the surplus lines statutes constitutes a public offense punishable by up to one year in jail; and a maximum fine of $10,000. Again, however, liability against Essex was imposed as a result of its breach of implied duty to investigate, communicate and settle—not as a result of any Insurance Code violation.

We also find little basis to utilize the comparison provided by Insurance Code section 790.035, subdivision (a), which imposes a civil penalty against an insurance company of $10,000 for each willful, unfair or deceptive act or practice defined in Insurance Code section 790.03. Even if Essex's failure to investigate, communicate and settle with PBC could be deemed a "practice" under Insurance Code section 790.03, subdivision (h), liability was premised on its handling of a single claim with a single insured. For this reason, we agree with the court in *Century Surety Co. v. Polisso, supra,* 139 Cal.App.4th at page 967, that "[t]his provision [Insurance Code section 790.035] is not particularly useful where as here [the insurer] engaged in a course of conduct over a five year period that involved many prohibited acts, although no findings were made as to the exact number of those acts." Accordingly, the trial court properly exercised its discretion in excluding this factor from its calculus.

In *Neal, supra,* 21 Cal.3d at page 932, the court observed that, in reviewing a challenge to a conditional new trial order remitting the amount of punitive damages, the question is "whether the challenged order . . . lacked substantial support in the record."

Here, the trial court carefully evaluated the evidence, analyzed it in accordance with the applicable factors and concluded that the punitive damages award must be reduced to the amount of the compensatory damages award. The record amply supports the trial court's determination and we find no basis to disturb it.[2]

II. The Trial Court Properly Denied Essex's Motion for Judgment Notwithstanding the Verdict on the Issue of Punitive Damages.

In the same order in which it granted a conditional new trial, the trial court denied Essex's motion for judgment notwithstanding the verdict (JNOV), reasoning that "there was sufficient evidence from which the jury could conclude that punitive damages are appropriate." Though we have implicitly reached the same conclusion by way of affirming the conditional grant of a new trial, we will briefly address Essex's challenges to the denial of JNOV.

The trial court evaluates a motion for JNOV differently than a motion for a new trial. "'A motion for judgment notwithstanding the verdict of a jury may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom in support of the verdict, the motion should be denied. [Citation.] [Citation.] The same standard of review applies to the appellate court in reviewing the trial court's granting [or denying] of the motion. [Citations.] Accordingly, the evidence . . . must be viewed in the light most favorable to the jury's verdict, resolving all conflicts and drawing all inferences in favor of that verdict.' [Citation.]" (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 259; accord, *Shapiro v. Prudential Property & Casualty Co.*

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[2] We note that the trial court's ruling was not premature. Though PBC argues that its cause of action for violation of Business and Professions Code section 17200 remained pending, the trial court ruled otherwise and concluded that there would be no further trial on that claim. PBC has not challenged that ruling on appeal.

(1997) 52 Cal.App.4th 722, 730 [“““The scope of appellate review of a trial court’s denial of a motion for judgment notwithstanding the verdict is to determine whether there is any substantial evidence, contradicted or uncontradicted, supporting the jury’s conclusion and where so found, to uphold the trial court’s denial of the motion”””].)

To establish that an insurer’s conduct has gone sufficiently beyond bad faith to support an award of punitive damages, an insured must show by clear and convincing evidence that the insurer acted maliciously, oppressively, or fraudulently. (*Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 328 (*Mock*).) In *Mock*, the court explained: “““Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or ‘malice,’ or a fraudulent or evil motive on the part of the defendant, *or such a conscious and deliberate disregard of the interests of others that his conduct may be called wilful or wanton*.” [Citation.]’” (*Ibid*.) PBC made such a showing in this case.

PBC presented evidence that Essex showed a conscious and deliberate disregard for the interests of its own insured to the point where the jury could well have concluded that Essex’s conduct was willful or wanton. As discussed earlier, at each step in its investigation, Essex disregarded PBC’s interests. Specifically, the Essex adjuster handling PBC’s claim did not investigate the mechanics of the SPARTA Program—including its notice and coverage provisions—even though he had never handled a claim through that program. As a result, Essex raised lack of notice as a coverage defense, even though PBC had provided notice as directed by the SPARTA Program. Further, Essex never investigated the claims made by the Robinsons regarding their loss of use and personal injury—claims which the Essex adjuster ultimately conceded raised the potential for coverage. Instead, Essex consistently maintained its coverage position and effectively abandoned PBC by denying coverage and refusing to participate in or consent to a settlement.

Essex does not meaningfully dispute that its inadequate investigation amounted to a conscious disregard of PBC’s interests. Rather, Essex focuses on its actions in connection with the settlement, asserting that it acted within its rights in declining to

consent to the settlement. Essex relies on the well settled principle "that a *defending* insurer has the right to control the defense of a claim asserted against its insured and ordinarily, is not bound by any settlement of that claim made without its consent. [Citation.]" (*Wolkowitz v. Redland Ins. Co.* (2003) 112 Cal.App.4th 154, 165, fn. 13.) "[B]ut 'if an insurer "erroneously denies coverage and/or improperly refuses to defend the insured" in violation of its contractual duties, "the insured is entitled to make a reasonable settlement of the claim in good faith and may then maintain an action against the insurer to recover the amount of the settlement . . . ." [Citation.]' (*Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 791.)" (*Fuller-Austin Insulation Co. v. Highlands Ins. Co.* (2006) 135 Cal.App.4th 958, 984.) Here, Essex did not consent to the settlement because of its erroneous determination that there was no coverage for the Robinson action. Under these circumstances, PBC was entitled to enter into a reasonable settlement without Essex's consent.

Finally, Essex contends that the evidence before the jury in this case showed nothing more than unreasonable conduct, analogous to cases in which courts have declined to find that an insurer's actions supported a punitive damages award. In *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, the insurer was held to be liable for bad faith on the basis of its unreasonable denial of benefits. (*Id*. at p. 1281.) But the court found the evidence insufficient to support punitive damages, noting that the evidence did not show a conscious and deliberate disregard of the insured's rights. Rather, "the actions of appellant [insurer] may be found to be negligent (failing to follow up information provided by the insured), overzealous (taking an unnecessary deposition under oath of the insured), legally erroneous (relying on an endorsement which was not shown to have been delivered), and callous (failing to communicate)." (*Id*. at p. 1288.) Here, there was more. Essex not only failed to follow up on information provided by PBC and took a legally erroneous position, but it also denied coverage on multiple grounds it never investigated and, as Peterson opined, affirmatively misrepresented the scope of coverage. Essex's steadfast and erroneous focus on coverage denial, based in large part on Essex's failure to acknowledge or investigate the information provided by

PBC showing compliance with the SPARTA Program's requirements, likewise distinguish the circumstances here from those in *Stewart v. Truck Ins. Exchange* (1993) 17 Cal.App.4th 468, 483, where the court found that the insurer did not act with conscious disregard of the insured's rights given that the record reflected "an ongoing effort by Truck to obtain the necessary information to evaluate Stewart's damages" and showed that "[w]hile Truck's investigation could possibly have been pursued with more vigor, it was nonetheless pursued, not ignored."

We are satisfied that there was sufficient evidence to support the jury's finding that punitive damages should be imposed. "Jurors, not appellate justices, hear the evidence and determine the facts. Properly instructed, they are the primary arbiters of acceptable behavior between an insurer and its insured. It is they, with their collective understanding of the limits of what decent citizens ought to have to tolerate, who are charged with assessing the degree of reprehensibility and meting out an appropriate financial disincentive for untoward claims practices." (*George F. Hillenbrand, Inc. v. Insurance Co. of North America*, *supra,* 104 Cal.App.4th at p. 816.) The trial court properly denied Essex's JNOV motion.

CONCLUSION

The order granting a conditional new trial is affirmed and the matter is remanded for PBC to determine whether it will accept the remittitur. Parties to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ